

The opinion in support of the decision being entered today is *not* binding
precedent of the Board.

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte PAUL F. NUGENT, JR.

Appeal 2007-1840
Application 10/024,800
Technology Center 2800

Decided: September 12, 2007

Before LEE E. BARRETT, ANITA PELLMAN GROSS, and
JOHN A. JEFFERY, *Administrative Patent Judges*.

JEFFERY, *Administrative Patent Judge*.

DECISION ON APPEAL

Appellant appeals under 35 U.S.C. § 134 from the Examiner's
rejection of claims 1-22. We have jurisdiction under 35 U.S.C. § 6(b). We
affirm-in-part.

STATEMENT OF THE CASE

Appellant invented a weigh scale. Specifically, the scale comprises two elongate support members that each contains a strain gauge to indicate the weight of an item placed across the two members. The support members are structurally connected solely by a surface plate that rests on the support members to provide a flat surface to receive items to be weighed.¹ Claims 1 and 8 are illustrative with the relevant limitations in dispute emphasized:

1. A scale comprising a pair of elongate support members, each member containing a gauge which provides an indication of the weight of an item placed across the two members, the members being structurally connected solely via a *surface plate* adapted to rest on the support members to provide a substantially flat surface to receive items to be weighed.

8. A scale, comprising:

a first gauge assembly having (i) a first gauge operable to generate a first output in response to force being applied thereagainst, and (ii) a first elongated support member positioned in relation to said first gauge such that force applied against said first elongate support member causes force to be applied against said first gauge;

a second gauge assembly having (i) a second gauge operable to generate a second output in response to force being applied thereagainst, and (ii) a second elongated support member positioned in relation to said second gauge such that force applied against said second elongate support member causes force to be applied against said second gauge; and

a *load plate* configured to rest on said first elongated support member and said second elongated support member,

wherein said first gauge assembly and said second gauge assembly are structurally connected solely via said load plate when said load plate rests on

¹ See generally Specification 2:11-18.

said first elongated support member and said second elongated support member.

The Examiner relies on the following prior art reference to show unpatentability:

Sternberg	US 2003/0111275 A1	Jun. 19, 2003 (filed Dec. 18, 2001)
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1. Claims 1, 2, 5, 8-11, and 15-19 stand rejected under 35 U.S.C. § 102(e) as being anticipated by Sternberg.
2. Claims 3, 4, 6, 7, 12-14, and 20-22 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Sternberg.

Rather than repeat the arguments of Appellant or the Examiner, we refer to the Brief and the Answer² for their respective details. In this decision, we have considered only those arguments actually made by Appellant. Arguments which Appellant could have made but did not make in the Brief have not been considered and are deemed to be waived. *See* 37 C.F.R. § 41.37(c)(1)(vii).

OPINION

I. The Anticipation Rejection

We first consider the Examiner's rejection of claims 1, 2, 5, 8-11, and 15-19 under 35 U.S.C. § 102(e) as being anticipated by Sternberg. Anticipation is established only when a single prior art reference discloses, expressly or under the principles of inherency, each and every element of a

² A Brief was initially filed on Nov. 26, 2004 and an Answer mailed May 19, 2005. A second Brief, however, was filed on Feb. 7, 2006 responsive to an Order from the Board. A second Answer was mailed on Mar. 6, 2006. We refer to the Feb. 2006 Brief and the Mar. 2006 Answer throughout this opinion.

claimed invention as well as disclosing structure which is capable of performing the recited functional limitations. *RCA Corp. v. Applied Digital Data Systems, Inc.*, 730 F.2d 1440, 1444, 221 USPQ 385, 388 (Fed. Cir. 1984); *W.L. Gore and Associates, Inc. v. Garlock, Inc.*, 721 F.2d 1540, 1554, 220 USPQ 303, 313 (Fed. Cir. 1983).

Independent Claim 8

The Examiner has indicated how the claimed invention is deemed to be fully met by the disclosure of Sternberg (Answer 3-4). Regarding independent claim 8, Appellant argues that Sternberg does not disclose a load *plate* configured to rest on the first and second elongated support members as claimed. According to Appellant, Sternberg discloses a mattress support 12 which is the combination of a mattress-like top member and a box spring-like bottom member. Such a structure, Appellant contends, simply does not possess the qualities of a plate (Br. 10-11).

Appellant does not dispute that Sternberg discloses all of the limitations of claim 8 except for the disputed “load plate” limitation. The issue before us, then, is relatively narrow: can Sternberg’s mattress support structure reasonably constitute a “load plate”? Based on the record before us, we do not find that it can giving the term “load plate” its broadest reasonable interpretation in light of Appellant’s disclosure.

At the outset, since Appellant has not specifically defined the term “plate” in the specification, we construe the term with its plain meaning (i.e.,

the ordinary and customary meaning given to the term by those of ordinary skill in the art).³

To support their respective interpretations of the term “plate,” the Appellant and the Examiner provide competing dictionary definitions. Appellant contends that the term “plate” is defined as “a flat, thin piece of material, such as metal” (Br. 11 n.1; Ev. App.). The Examiner, on the other hand, cites two dictionary definitions of the term “plate”: (1) “a horizontal structural member that provides bearing and anchorage”; and (2) “[a] smooth, flat, relatively thin, rigid body of uniform thickness” (Answer 6). Based on this evidence, we find that Appellant’s definition of “plate” more reasonably comports with the ordinary and customary meaning of the term “plate” in light of Appellant’s disclosure.⁴ We therefore decline to adopt the Examiner’s construction of “plate.”

Regarding the Examiner’s first definition of the term “plate,”⁵ the Examiner notes that the bed frame of Sternberg is horizontal and serves as a structural member for the bed. The Examiner also indicates that Sternberg’s

³ See *Brookhill-Wilk 1, LLC v. Intuitive Surgical, Inc.*, 334 F.3d 1294, 1298, 67 USPQ2d 1132, 1136 (Fed. Cir. 2003) (“In the absence of an express intent to impart a novel meaning to the claim terms, the words are presumed to take on the ordinary and customary meanings attributed to them by those of ordinary skill in the art.”); see also *Phillips v. AWH Corp.*, 415 F.3d 1303, 1312, 75 USPQ2d 1321, 1326 (Fed. Cir. 2005) (en banc).

⁴ See *Free Motion Fitness, Inc. v. Cybex Int’l, Inc.*, 423 F.3d 1343, 1348, 76 USPQ2d 1432, 1436 (Fed. Cir. 2005) (internal citations omitted) (noting that reliance on dictionaries must accord with the intrinsic evidence: the claims, specification, and the prosecution history).

⁵ The Examiner’s first definition of “plate” is “[a] horizontal structural member that provides bearing and anchorage” (Answer 6).

bed fully meets the second definition of “plate”⁶ since the bed is not only smooth, flat, and uniformly thick, its frame is rigid. Although the Examiner acknowledges that it is unclear whether the bed is “relatively thin” under this definition, the Examiner nonetheless contends that the term is not dispositive since it merely recites a *relative* thinness, but does not indicate what such thinness is relative to (Answer 6-7).

We will not sustain the Examiner’s rejection of independent claim 8. Sternberg discloses a portable weighing system for a bed 10 that accurately determines the weight of a person in bed. The weighing system comprises a pair of scales 20 placed under the legs or support members 14 of the bed. The scales are connected to a weight data collector 50. The scales are positioned directly below the ends of the bed and rest on the floor. The bed’s legs or support members are then placed on the scales (Sternberg, abstract; ¶ 0037; Figs. 1, 2, and 5).

We do not agree with the Examiner that Sternberg’s mattress support member 12 can be reasonably construed as a “plate” – even under the Examiner’s own definitions. Although the Examiner contends that the mattress support 12 can be construed as “a horizontal structural member that provides bearing and anchorage” under the Examiner’s first definition, we nonetheless find that skilled artisans would simply not reasonably consider this structure a “plate” as the term is ordinarily understood.

As Appellant indicates, a “plate” is a “flat, thin *piece of material*, such as metal” (Br. 11 n.1; emphasis added). While a plate need not be metal under this definition, it must nevertheless be a “piece of material” – a

⁶ The Examiner’s second definition of “plate” is “[a] smooth, flat, relatively thin, rigid body of uniform thickness” (Answer 6).

description which strongly suggests a unitary structure. While the Sternberg reference is hardly a model of clarity regarding what exactly constitutes the mattress support member 12, we can say that it is hardly a “piece of material” under this definition and therefore not a “plate” as the term would be understood by skilled artisans. In our view, to hold that this mattress support 12 somehow constitutes a “plate” simply strains any reasonable construction of the term.

Furthermore, we find Sternberg’s mattress support 12 falls short even under the Examiner’s second definition⁷ as well. At the outset, it is unclear whether the Examiner considers both the bed and bed frame to correspond to the “plate” under this definition.⁸

In any event, Sternberg’s Figure 4 illustrates generally that the mattress support 12 is flat. Arguably, the mattress support is also rigid and has a uniform thickness. Indeed, if it were not rigid, it would not have a uniform support elevation between the legs 14 and would sag (or even collapse). Nonetheless, we fail to see how the mattress support member can also be “relatively thin” and “smooth” as required by the Examiner’s definition.

There is no reasonable indication in Sternberg that the mattress support is “smooth.” Not only is the specification of the reference silent on this point, the figures merely depict the structure generally. Such a general depiction hardly guarantees a “smooth” structure. Moreover, we find the Examiner’s position that the mattress support is “relatively thin”

⁷ See P. 5, *supra*, of this opinion.

⁸ “The *bed* of Sternberg certainly is “‘smooth’, ‘flat’ and has a ‘uniform thickness’. The *bed frame* is obviously ‘rigid’....” (Answer 6; emphasis added).

problematic. Although such a term merely indicates a *relative* degree of thinness as the Examiner indicates, to hold that the mattress support in Sternberg is “relatively thin” would simply strain the meaning of the term beyond reasonable limits. At best, the skilled artisan would have to consider the thickness of the mattress support structure as “relatively thin” with respect to the entire structure (i.e., from the bed base 26 to the mattress). This construction, along with the other strained constructions noted previously, simply does not comport with the ordinary and customary meaning of the term “plate” in light of Appellant’s disclosure.

Therefore, we find that Sternberg’s mattress support does not reasonably constitute a “load plate” for this additional reason.

For the foregoing reasons, we will not sustain the Examiner’s rejection of independent claim 8 or dependent claims 9-11 and 15 which fall with claim 8.

Independent claim 1

We will also not sustain the Examiner’s rejection of independent claim 1 for similar reasons. Our previous discussion regarding the failure of Sternberg’s mattress support member to reasonably constitute a “load plate” applies equally for the disputed “surface plate” limitation recited in claim 1. We therefore incorporate that discussion by reference.

Accordingly, we will not sustain the Examiner’s rejection of claim 1 for reasons similar with those indicated with respect to claim 8. Likewise, we will not sustain dependent claims 2 and 5 which fall with claim 1.

Independent claim 16

We will, however, sustain the Examiner's rejection of independent claim 16. Claim 16 differs from the other independent claims in two significant respects. First, claims 1 and 8 require that the elongated support members (claim 1) or gauge assemblies (claim 8) are structurally connected *solely via the load (or surface) plate*. Claim 16, however, contains no such limitation. Second, claim 16 positively recites that the load plate "*rest[s] on*" the elongated support members.

With respect to the first key difference, we find that the horizontal portion of the unlabeled angled structural member located between the legs 14 and the lower mattress support member 12 as shown in Figs. 4 and 5 of Sternberg reasonably constitutes a "load plate" as claimed. Not only does this horizontal portion bear the weight of the overlying bed and support structure, its flat, thin structure also fully meets a "plate" under either the Appellant's or the Examiner's definitions.⁹ Significantly, unlike claims 1 and 8, this "plate" need not solely structurally connect the elongate support members or gauge assemblies as noted above.¹⁰ See the enlarged detail view of Sternberg's Figure 5 for clarity:

⁹ See P. 5, *supra*, of this opinion.

¹⁰ In fact, to meet this limitation in claims 1 and 8, the load (or surface) plate must include at least the entire length of the mattress support 12 that spans the distance between the respective support members (scales) 20. See Sternberg, Fig. 4.

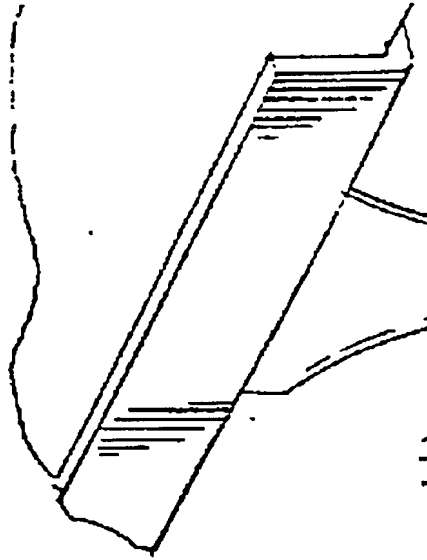


Figure 1: Enlarged Detail View of Figure 5 of Sternberg Illustrating “Load Plate”

We now address the second key difference distinguishing independent claim 16 noted above. Appellant reiterates that Sternberg does not disclose a “load plate,” but adds that Sternberg also fails to disclose a load plate that *rests on* the first and second elongated support members as claimed. According to Appellant, Sternberg’s mattress support 12 does not “rest on” the scales 20 due to the presence of legs 14 interposed therebetween (Br. 13).

The Examiner notes that nothing in the claim requires that the load plate rest *directly* upon its supports. As such, the Examiner argues, the bed frame effectively “rests upon” the scales (supports) via the intervening legs 14.

We agree with the Examiner. Even assuming that Sternberg’s angled “load plate” does not *directly* rest on the underlying support members (scales), the scope and breadth of the claim language simply does not

preclude this plate “resting upon” the support members via the intervening leg members 14. Claim 16 is therefore fully met by Sternberg.

For the foregoing reasons, we will sustain the Examiner’s rejection of independent claim 16. Moreover, since Appellant has not separately argued the patentability of dependent claims 17-19 with particularity, these claims fall with claim 16. *See* 37 C.F.R. § 41.37(c)(1)(vii).

II. The Obviousness Rejection

We now consider the Examiner’s rejection of claims 3, 4, 6, 7, 12-14, and 20-22 under 35 U.S.C. § 103(a) as unpatentable over Sternberg. In rejecting claims under 35 U.S.C. § 103, it is incumbent upon the Examiner to establish a factual basis to support the legal conclusion of obviousness. *See In re Fine*, 837 F.2d 1071, 1073, 5 USPQ2d 1596, 1598 (Fed. Cir. 1988). In so doing, the Examiner must make the factual determinations set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 17, 148 USPQ 459, 467 (1966). Furthermore, “‘there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness’ [H]owever, the analysis need not seek out precise teachings directed to the specific subject matter of the challenged claim, for a court can take account of the inferences and creative steps that a person of ordinary skill in the art would employ.” *KSR Int’l Co. v. Teleflex Inc.*, 127 S. Ct. 1727, 1741, 82 USPQ2d 1385, 1396 (2007) (quoting *In re Kahn*, 441 F.3d 977, 988, 78 USPQ2d 1329, 1336 (Fed. Cir. 2006)).

If the Examiner’s burden is met, the burden then shifts to the Appellants to overcome the prima facie case with argument and/or evidence. Obviousness is then determined on the basis of the evidence as a whole and

the relative persuasiveness of the arguments. *See In re Oetiker*, 977 F.2d 1443, 1445, 24 USPQ2d 1443, 1444 (Fed. Cir. 1992).

Claims 3, 4, 6, 7, and 12-14

Regarding the rejection of dependent claims 3, 4, 6, 7, and 12-14 under 35 U.S.C. § 103, the Examiner has presented no further evidence or explanation in the rejection of these claims that would cure the deficiencies noted above with respect to independent claims 1 and 8. Accordingly, the obviousness rejection of claims 3, 4, 6, 7, and 12-14 is also not sustained.

Claims 20-22

Since no further arguments were presented regarding the obviousness of claims 20-22, the Examiner's prima facie case of obviousness for these claims has not been persuasively rebutted. Accordingly, we will sustain the Examiner's rejection of these claims for the same reasons as for the rejection of claims 16-19.

DECISION

We have not sustained the Examiner's rejections with respect to claims 1-15. We have, however, sustained the Examiner's rejection of claims 16-22. Therefore, the Examiner's decision rejecting claims 1-22 is affirmed-in-part.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv).

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AFFIRMED-IN-PART

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